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Human rights bodies and mechanisms

Research-based study on the impact of flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights

Progress report of the Advisory Committee of the Human Rights Council

Obiora Okafor and Jean Ziegler** (Co-Rapporteurs)*

* Mr. Okafor is the author of sections I, II, IV, VIII and IX. The Co-Rapporteur would like to thank Sanaa Ahmed, of the Osgoode Hall Law School, Toronto, Canada, for her assistance in their preparation.

** Mr. Ziegler is the author of sections III, V, VI, VII and X. The Co-Rapporteur would like to thank Milena Costas Trascasas for her assistance in their preparation.

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Contents

		Page
I.	Mandate and background	3
II.	Introduction and definition	3
	A. Definition of illicit financial flows	3
	B. Estimates	5
III.	Non-repatriation of illicit financial flows: overview of the problem	5
IV.	Best practices in the return of illicit funds	6
V.	National legislation: Switzerland	9
	A. Compliance of Swiss banks with anti-money-laundering legislation	10
	B. Return of stolen assets	11
VI.	Case studies on the repatriation of illicit financial flows	11
	A. Nigeria	11
	B. Tunisia	12
	C. Malaysia	13
VII.	Negative impact of the non-repatriation of illicit financial flows on the enjoyment of human rights	13
VIII.	Main challenges inhibiting the return of illicit funds	15
IX.	Importance of international cooperation in the return of funds of illicit origin	17
X.	Conclusions and recommendations	18

I. Mandate and background

1. In its resolution 31/22, the Human Rights Council requested its Advisory Committee to conduct a comprehensive research-based study on the impact of flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights, with a special emphasis on the right to development.

2. Among its other goals, the study was commissioned with a view to compiling relevant best practices and main challenges and to make recommendations on tackling those challenges on the basis of the best practices in question. The Advisory Committee was asked to present a progress report to the Human Rights Council at its thirty-sixth session for its consideration. The Council also requested the Advisory Committee to seek, if necessary, further views and the input of Member States, relevant international and regional organizations, the United Nations High Commissioner for Human Rights and relevant special procedures, as well as national human rights institutions and non-governmental organizations (NGOs) in order to finalize the study. The Council further requested the Advisory Committee to take into account the final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (A/HRC/31/61).

3. At its seventeenth session, the Advisory Committee established a drafting group composed of Mario Luis Coriolano, Mikhail Lebedev, Obiora Chinedu Okafor (Co-Rapporteur), Ahmer Bilal Soofi (Chair) and Jean Ziegler (Co-Rapporteur). Mona Omar joined the drafting group during the eighteenth session of the Committee.

4. The present report additionally draws on earlier studies sponsored by the United Nations, including:

(a) Illicit financial flows, human rights and the post-2015 development agenda: interim study by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky (A/HRC/28/60 and Corr.1);

(b) Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development by the Independent Expert, Mr. Bohoslavsky (A/HRC/31/61);

(c) "Illicit financial flows, tax and human rights", background paper prepared by Esther Shubert to inform the final study;[1]

(d) The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights: interim report by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina (A/HRC/22/42 and Corr.1).

II. Introduction and definition

A. Definition of illicit financial flows

5. As important as it is to the problems of underdevelopment, poverty and the lack of realization of human rights around the world, the expression "illicit financial flows" is a

[1] Available at www.ohchr.org/Documents/Issues/IEDebt/IllicitFinancialFlowsConsultation/BackgroundPaperFinal.pdf.

term that has no single, universally accepted definition. The United Nations has, thus far, not expressly defined the term.

6. The emergent consensus, however, is that "illicit" means much more than simply "illegal". Accordingly, definitions such as those offered by Global Financial Integrity, a research and advocacy organization working to curb such flows, which conflate the term "illicit" and "illegal" and thus limit the meaning to the "illegal movements of money or capital from one country to another"[2] are now generally disfavoured, including by the International Monetary Fund (IMF),[3] the Organization for Economic Cooperation and Development (OECD)-Group of 20 (G-20)[4] and the Tax Justice Network.[5] Other abusive practices, such as forms of tax avoidance and transfer mispricing, are now seen as also being within the ambit of illicit financial flows. Even more strikingly, the United Nations Conference on Trade and Development (UNCTAD) has adopted a broader definition of illicit financial flows that includes activities "contravening the law or its spirit".[6] What is more, the Economic Commission for Africa (ECA) has defined illicit financial flows to include "commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials".[7]

7. Based on the foregoing, any useful definition of illicit financial flows would necessitate a broader, two-tiered interpretation of the word "illicit". In the first interpretation, "illicit" would refer to funds which are illegally earned, transferred or utilized and include all unrecorded private financial outflows that drive the accumulation of foreign assets by residents in breach of relevant national or international legal frameworks. More specifically: funds relating to the proceeds of crime — for example, funds acquired through corruption; criminal activities; abuse of powers including theft of State assets/funds; market abuse; tax abuse; and regulatory abuse would be included.

8. In its second sense, "illicit" would refer to funds from legitimate economic activity that become illicit due to their being handled or dealt with subsequently in contravention or circumvention of the law (see A/HRC/22/42 and Corr.1, para. 5). This includes all arrangements designed to circumvent the law or its spirit such as tax evasion, forms of tax avoidance and forms of tax optimization schemes, as well as profit shifting by multinational corporations, trade misinvoicing and transfer mispricing. This definition is consistent with the one employed in the final study.

9. Finally, and perhaps more importantly, this definition, with its inclusion of tax avoidance, is in consonance with current politico-economic exigencies. Two recent "political" events seem to indicate the increasing centrality of tax avoidance to a working definition of illicit financial flows. The first is the political fallout from the Panama Papers and the second is the creation of the Platform for Collaboration on Tax, a joint initiative of IMF, OECD, the United Nations and the World Bank. Thus, tax avoidance has clearly evolved into a significant political issue distinct from its twin (i.e., tax evasion) and any

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[2] See www.gfintegrity.org/issue/illicit-financial-flows/.

[3] Rabah Arezki, Gregoire Rota-Graziosi and Lemma W. Senbet, "Capital flight risk", *Finance and Development*, vol. 50, No. 3 (September 2013). Available at www.imf.org/external/pubs/ft/fandd/2013/09/arezki.htm.

[4] See www.oecd.org/tax/beps/beps-about.htm and www.oecd.org/tax/closing-tax-gaps-oecd-launches-action-plan-on-base-erosion-and-profit-shifting.htm.

[5] See www.taxjustice.net/topics/inequality-democracy/capital-flight-illicit-flows/.

[6] United Nations Conference on Trade and Development (UNCTAD), *Trade and Development Report, 2014* (United Nations publication, Sales No. E.14.II.D.4), p. 173. Available at http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf.

[7] Economic Commission for Africa (ECA), *Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa* (2016), p. 9. Available at www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf. ECA was mandated to establish the High Level Panel by the Joint African Union Commission on Human and Peoples' Rights-Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development at its fourth meeting, held in 2011. The Chair of the Panel was the former President of South Africa, Thabo Mbeki.

attempt to sidestep it in a study like the present one is untenable. This is particularly true as the majority of all illicit financial flows are related to cross-border tax transactions (see A/HRC/31/61, para. 5), while corruption-based outflows are a very small fraction of the total (see A/HRC/28/60 and Corr.1, para. 14).

B. Estimates

10. Relying on trade data and balance of payments leakages for its December 2015 report,[8] the research and advocacy non-profit organization Global Financial Integrity estimated that in 2013, $1.1 trillion left developing countries in illicit financial outflows. This highly conservative estimate does not pick up movements of bulk cash, the mispricing of services or many types of money-laundering.[9] UNCTAD, meanwhile, endorses the estimate of the French NGO Comité catholique contre la faim et pour le développement-Terre solidaire of €800 billion worth of illicit financial flows per annum.[10] Significantly, in its analysis of the three broad motivations driving illicit financial flows — crime, corruption and tax abuse — UNCTAD argues that "only about a third of total illicit financial flows represent criminal money, linked primarily to drugs, racketeering and terrorism. ... [M]oney from corruption is estimated to amount to just 3 per cent. The third component, which accounts for the remaining two thirds of the total, refers to cross-border tax-related transactions, about half of which consists of transfer pricing through corporations."[11] Comparatively, Global Financial Integrity estimates that trade misinvoicing accounts for 83.4 per cent of measurable illicit financial flows, on average.[12] ECA, on the other hand, estimates that the continent has lost more than $1 trillion in illicit financial flows in the last 50 years and continues to haemorrhage over $50 billion per annum. The figure is understood to be a conservative estimate due to, first, the lack of accurate data for all African countries and second, the fact that some forms of illicit financial flows — such as the proceeds of bribery and drugs/firearms and human trafficking — cannot be reliably assessed.[13]

III. Non-repatriation of illicit financial flows: overview of the problem

11. The effective repatriation of looted assets to the countries of origin remains instrumental to the global effort to support development, good governance, the enjoyment of all human rights and the strengthening of the rule of law around the world. The non-return of such funds contributes immensely to the violation of human rights (including social and economic rights), especially in developing countries. However, numbers show that only a tiny portion of illicit funds transferred abroad is effectively returned to the countries of origin. In the period 2006-2012, the total amount of assets returned by OECD States represented 1.6 per cent of those that remained frozen.[14] Six years after the Arab

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[8] Dev Kar and Joseph Spanjers, *Illicit Financial Flows from Developing Countries: 2004-2013* (Global Financial Integrity, 2015). Available at http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf. In its report, Global Financial Integrity estimated that developing and emerging countries lost $7.8 trillion during the period under study. Illicit financial flows grew at an average rate of 6.5 per cent per annum during this period and topped $1 trillion in 2011. The authors of the report justify the selection of the period 2004-2013 for analysis by pointing to the fact that that was the most recent 10-year period for which data were available (pp. vii and 5).

[9] See www.gfintegrity.org/issue/illicit-financial-flows/.

[10] UNCTAD, "Urgent global action needed to tackle tax avoidance", 30 September 2014. Available at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=838&Sitemap_x0020_Taxonomy=CSO.

[11] UNCTAD, *Trade and Development Report, 2014*, p. 173.

[12] Kar and Spanjers, *Illicit Financial Flows*, p. 1.

[13] ECA, *Illicit Financial Flows: Report of the High Level Panel*, p. 15.

[14] Between 2006 and 2009, $277 million out of $1,225,000,000 frozen, and between 2010 and2012, $147.2 million out of $1,398,000,000 frozen. OECD, *Illicit Financial Flows from Developing*

Spring, this trend remains: the looted States (Egypt, Libya, Tunisia and Yemen) have recovered only $1 billion of the $165 billion stolen by their former dictators.[15]

12. Attempts to repatriate stolen assets most commonly imply undertaking long, complex and costly mutual legal assistance procedures which, in the best scenario, may end up with the repatriation of only a portion of the misappropriated assets to the country of origin.[16] The burden of reaching a solution essentially relies on the good faith and the success of the cooperation between the concerned States.[17]

13. Proving the illicit origin of the stolen money often turns out to be an unsurmountable requirement in practice.[18] Difficulties in such procedures may lead a State to conclude extrajudicial agreements by means of which impunity is granted to those who looted the public funds in exchange for recovering a part of the assets.[19]

14. It is striking to see how the money that has been stolen and is urgently needed for development and the realization of all human rights is instead stalled in banks of developed countries that continue to accrue gains from it.[20] As long as the "dirty money" remains frozen, banks continue to charge their "captive clients" particularly high management commissions.

15. The role played by banks as facilitators of money-laundering and corruption very often goes unnoticed. Domestic laws require enhanced scrutiny of politically exposed persons, but such laws are often not observed.[21] In addition, offshore jurisdictions provide a perfect regulatory set-up to those seeking to obscure links to money, by means of shell companies, nominee directors and secrecy.[22]

IV. Best practices in the return of illicit funds

16. A number of global best practices in the return of illicit funds can be discerned from the available evidence. If globally adhered to, these best practices will help in ensuring that countries of origin have much greater access to the necessary funds to ensure the enjoyment

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Countries: Measuring OECD Responses (2014), p. 88. Available from www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf.

[15] Transparency International, *Lost Billions: Recovering Public Money in Egypt, Libya, Tunisia and Yemen* (2016), p. 1.

[16] Generally speaking, frozen assets can only be returned to the country of origin after the judicial authorities demonstrate the illicit origin of the assets, normally on the basis of information obtained within the framework of mutual legal assistance.

[17] There is no structured international process or established body to facilitate asset recovery processes. In the framework of the United Nations Convention against Corruption, the Open-ended Intergovernmental Working Group on Asset Recovery was set up in 2006 to provide advice and assistance to the Conference of States Parties.

[18] M. Schnebli, "Lessons learned from the past: today's response from requested countries", in G. Fenner Zinkernagel, Charles Monteith and Pedro Gomes Pereira, *Emerging Trends in Asset Recovery* (2013), p. 51.

[19] In 2016, following a reconciliation agreement concluded by the Government of Egypt, criminal proceedings against several persons connected with former President Mubarak were dropped. As a consequence, Swf 180 million that were frozen in Switzerland were released without any condition. Proceedings on money-laundering in Switzerland were also precluded. Swiss Confederation, "Arab Spring: Attorney General meets Egyptian authorities in Cairo", 17 December 2016.

[20] A report of the United States Senate showed how financial professionals and institutions were used to bring large amounts of suspect funds into the country to advance their interests. Permanent Subcommittee on Investigations, *Keeping Foreign Corruption Out of the United States: Four Case Histories* (2010).

[21] Banks are among the biggest facilitators of tax dodging by other corporations. The list of European banks setting up offshore companies is headed by UBS and Credit Suisse. See Oxfam International, *Opening the Vaults: The Use of Tax Havens by Europe's Biggest Banks* (2017), p. 8.

[22] As the Independent Expert on the promotion of a democratic and equitable international order observes: "Collusion between the world's biggest banks, specialized law firms, and consulting and accounting firms has led to a global system designed to hide money and avoid taxes by virtue of secretive offshore structures" (see A/71/286, para. 13).

of human rights, including social and economic rights, in their jurisdictions. The following are some of these best practices.

17. *Greater scrutiny of politically exposed persons.* The term politically exposed persons was devised by the Financial Action Task Force in 2003 to refer to individuals (or their family members or close associates) who were or had been entrusted with a prominent public function.[23] The Task Force contended that such persons should undergo additional scrutiny since they were capable of abusing their position and influence to launder money or commit related predicate offences, including corruption and bribery, as well as conduct activity related to terrorist financing. The February 2012 revision to the Financial Action Task Force rules expanded the definition of politically exposed persons to include domestic politically exposed persons, in addition to those in foreign jurisdictions.[24] More significantly, the definition was extended to cover politically exposed persons in international organizations.[25] Financial institutions and other professionals were charged with conducting this scrutiny.[26]

18. *Reversal of the burden of proof.* This new requirement under money-laundering and anti-corruption laws — that an individual possessed of excessive wealth must demonstrate that such wealth has a legitimate origin — has had some success in impeding illicit financial flows. Further success may be achieved if destination countries accept foreign confiscation orders and provide legal and technical assistance to foreign jurisdictions.[27] This would be in consonance with articles 31, 43 and 48 (1) (f) of the United Nations Convention against Corruption. However, a few caveats are in order. First, several jurisdictions still adhere to the requirement that the prosecution must establish guilt beyond a reasonable doubt in criminal cases.[28] Second, such reversal also seems to run counter to the due process guarantees contained in the International Covenant on Civil and Political Rights, a point also articulated by Juan Pablo Bohoslavsky with respect to freezing assets or prosecuting those suspected of corruption or of handling or facilitating crime-related financial flows.[29]

19. *Pro-repatriation laws in destination countries.* The former President of Haiti, Jean-Claude Duvalier, was believed to have amassed over $300 million by skimming government contracts. This money was deposited in Swiss bank accounts. When Duvalier was deposed by popular revolt in 1986, Haiti asked the Swiss authorities to freeze $5 million, but couldn't secure its return since Haiti failed to mount a legal case. Duvalier

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[23] See www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2003.pdf, p. 14. Article 52 of the United Nations Convention against Corruption echoes this definition but in far less detail.

[24] Foreign politically exposed persons are defined as individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or Government, senior politicians, senior government, judicial or military officials, senior executives of State-owned corporations and important political party officials. Domestic politically exposed persons are individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or Government, senior politicians, senior government, judicial or military officials, senior executives of State owned-corporations and important political party officials. Financial Action Task Force, *FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)* (2013), pp. 4-5. Available at www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf.

[25] International organization politically exposed persons are persons who are or have been entrusted with a prominent function by an international organization. The term refers to members of senior management or individuals who have been entrusted with equivalent functions, i.e., directors, deputy directors and members of the board or equivalent. While even the 2003 version of the Task Force's 40 recommendations advised caution in dealings with politically exposed persons, the focus was on foreign politically exposed persons. *FATF Guidance*, p. 3.

[26] Ibid., p. 5.

[27] OECD, *Illicit Financial Flows from Developing Countries*, p. 16.

[28] See, for example, the response of Malaysia to the illicit funds questionnaire circulated by the Advisory Committee, available at www.ian.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/QuestionnairesIllicitFunds.aspx, as well as Human Rights Council resolution 31/22, submitted on behalf of the Group of African States.

[29] See his response to the questionnaire.

would have seen the money back by default in 2002 when the statute of limitations expired, had Switzerland not invoked constitutional powers which allow it to freeze assets in order to safeguard national interests. A 2011 Swiss law which reverses the burden of proof and a court decision have paved the way for the return of the money to the country of origin. The Foreign Illicit Assets Act 2015, which allows for the repatriation of funds held in Switzerland by foreign dictators has also been helpful in this regard.[30] However, several provisions of the law are open to entirely subjective interpretation that may be construed as derogating from the rights and interests of the countries of origin.[31] Equally problematic are article 15 of the law, which sets out criteria for "a presumption that assets are of illicit origin",[32] and article 17, which prescribes conditions for the repatriation of funds.[33] Accordingly, such pro-repatriation laws merit the introduction of appropriate and objectively determined safeguards that will protect the interests and rights of the countries of origin.

20. *Adequate training and funding of law enforcement officers.* The forensic audit skills required to trace monies held by multiple shell companies and parked in special purpose vehicles across multiple jurisdictions are not easily available, particularly in developing countries. While some developed countries are trying to build domestic capacity, effective asset recovery requires sufficient investment, both financially and in terms of staff (training for law enforcement officers, dedicated staff with sufficient expertise and funding to carry out investigations).[34]

21. *Greater transparency and exchange of information.* To combat illicit financial flows, law enforcement authorities must be able to access and exchange relevant information about activities, assets or incomes of individuals, companies and legal entities and arrangements in foreign jurisdictions. In the specific area of anti-money-laundering and counter-terrorism financing efforts, the Egmont Group, comprising 152 financial intelligence units, is an example of a global platform whereby expertise and financial intelligence are shared with a view to combating both crimes.[35]

22. *Robust, issue-specific and cross-jurisdictional institutional and professional networks.* Restricting the ambit of their anti-illicit financial flow operations to specific issues allows such networks to focus on the details, leverage their specializations and learn from each other's successes and failures and reduces the potential for politically motivated conflict in large groups. One such example is found in the Russian Federation, where the Office of the Prosecutor General, located in the Office of the Federal Prosecutor, promotes practicable international cooperation through formal and informal patterns of interaction between various national contact centres. This cooperation extends to the identification, arrest, confiscation and restitution of assets accumulated as a result of corruption.

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[30] The first beneficiary of the December 2015 law was Nigeria, which stands to receive $321 million of the monies stolen by Sani Abacha. See www.reuters.com/article/us-swiss-assets-idUSKCN0YU2QF and www.dailynigerianews.com/2016/07/29/nigeria-switzerland-sign-mou-on-repatriation-of-321m-abacha-loot/.

[31] The section regarding when an asset freeze is admissible reads as follows: "[where] the government or certain members of the government of the country of origin have lost power, or a change in power appears inevitable, the level of corruption in the country of origin is notoriously high, it appears likely that the assets were acquired through acts of corruption or misappropriation or other crimes, the safeguarding of Switzerland's interests requires the freezing of the assets" (art. 31(2)). Available at www.newsd.admin.ch/newsd/message/attachments/44109.pdf, p. 2.

[32] The presumption will follow if "the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased inordinately, facilitated by the exercise of a public function by a foreign politically exposed person, [and] the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office".

[33] "The restitution of assets is made in pursuit of the following objectives: (a) to improve the living conditions of the inhabitants of the country of origin, or (b) to strengthen the rule of law in the country of origin and thus to contribute to the fight against impunity."

[34] OECD, *Better Policies for Development 2014: Policy Coherence and Illicit Financial Flows*. Available at www.oecd.org/pcd/Better-Policies-for-Development-2014.pdf.

[35] See www.egmontgroup.org/en/content/about.

23. *Harmonization of global tax strategies.* Base erosion and profit shifting refers to aggressive tax avoidance strategies practised by multinational corporations. By exploiting gaps and mismatches in tax rules, these corporations artificially shift profits to no- or low-tax jurisdictions, thereby eroding the tax base of the host country, which inhibits a country's ability to guarantee the enjoyment of human rights to its people.[36] Often, these host countries are poor countries in the South. The harmonization of tax strategies across the globe, anti-abuse clauses in all tax treaties and enhanced disclosure requirements and transparency in both source and destination countries would eliminate the incentive for multinational corporations to shift profits from one jurisdiction to another.[37] For if all jurisdictions offered the same or similar tax rates, there would be no incentive to move revenues around as a tax evasion/avoidance strategy. Similarly, if all national tax administrations worked together to ensure effective compliance, i.e., taxpayers pay the correct amount to the right jurisdiction, the opportunities for multinational corporations to engage in base erosion and profit shifting (and to thus author illicit financial flows) would be severely diminished. A few steps in this direction are already under way, including efforts by the G-20 leaders, who have called for the implementation of an inclusive framework for base erosion profit shifting,[38] a new joint IMF-World Bank initiative on strengthening tax systems in developing countries, and the Addis Tax Initiative, designed to dramatically increase donor support for building tax capacity in poorer countries.[39]

24. *Promotion of global anti-corruption and tax reform initiatives through greater civil society participation.*[40] The United Nations Convention against Corruption, adopted in 2004, is a high-profile example of the mobilization of States as well as civil society, non-governmental organizations and grass-roots communities to a common end: the combating of corruption. Significantly, while the Convention holds States primarily responsible for rooting out corruption and effective international cooperation, it also places similar responsibility on individuals and groups comprising civil society to provide the support States require to achieve such ends.

V. National legislation: Switzerland

25. The case of Switzerland is very illustrative, as it shows that having an adequate domestic legal arsenal and political will do not necessary lead to the effective repatriation of stolen assets.[41]

26. With approximately 26 per cent of the world market for offshore private assets under management, the country is one of the major global financial centres. With particularly favourable national legislation on banking secrecy and lax anti-laundering laws, for many years Switzerland was a commercial paradise for the banking sector. Illicit financial flows, including the personal fortunes illicitly amassed by foreign dictators, indiscriminately flowed into Swiss banks. Banks acted with complete impunity and managed to avoid any kind of public control or scrutiny.[42]

27. Today, in theory, Swiss national anti-money-laundering laws oblige the banking sector to systematically scrutinize the origin of funds of dubious origin and to report any suspicious cases to the Swiss intelligence financial unit.[43] Regulations also provide for an enhanced control of politically exposed persons suspected of having enriched themselves by illicit means.

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[36] See www.oecd.org/ctp/beps/.

[37] See Human Rights Council resolution 34/11 submitted by Tunisia on behalf of the Group of African States and other countries.

[38] See www.oecd.org/tax/consult-new-platform-for-collaboration-on-tax.pdf, p. 4.

[39] Ibid., p. 1.

[40] This demand is endorsed by both Juan Pablo Bohoslavsky and the Egyptian Initiative for Personal Rights in their responses to the questionnaire.

[41] "In many other cases, there is a manifest lack of political will to repatriate stolen assets."

[42] Swiss Info, "The complex case of Tunisia's blocked funds", 6 April 2015.

[43] Financial intermediaries have the obligation to report to the Money-laundering Reporting Office Switzerland.

28. However, major obstacles to enforcing anti-money-laundering legislation still remain in practice. Regulations are poorly respected and major international scandals involving the Swiss financial market continue to come to light. In the opinion of many experts, the Swiss bank reporting system simply does not work: "It is quite obvious that the rules exist, but they are applied with insufficient care. This also means that regulators are not doing their job."[44] Thus, Swiss banks continue to benefit all too often from judicial impunity.

A. Compliance of Swiss banks with anti-money-laundering legislation

29. Swiss banks have traditionally been granted the autonomy to set their own operating rules.[45] The Swiss Financial Market Supervisory Authority, FINMA, is in charge of monitoring all institutions holding a banking licence in Switzerland. Despite being a public control body, FINMA does not belong to the federal administration. Its action is apparently independent from external interferences but not from the banks. The Board of Directors is composed mainly of former bank managers, as is most of its staff.[46] Furthermore, FINMA is financed by the very same institutions that are under its supervision: the banks.[47]

30. By law, FINMA is endowed with a great margin of discretion. This includes the capacity to refuse collaboration with criminal prosecutors or any other national authorities when it is considered to be incompatible with a procedure under way or with the aims of surveillance of financial markets. FINMA can also deny information not available to the public or refuse to handle any documentation to preserve its own supervisory procedure.[48]

31. The Authority's annual reports do not provide full information on cases of violation of the bank's due diligence, particularly regarding politically exposed persons. Even when sanction procedures are considered, information on the entities under investigation, the final outcomes of such procedures or the sanctions imposed are only partially released.[49]

32. A 2016 evaluation report on Switzerland by the Financial Action Task Force concluded that the process of reviewing existing customers in the banking sector "is unsatisfactory overall".[50] More specifically, sanctions imposed by the supervisory authorities were considered insufficient to prevent further violations.[51] Doubts about the efficacy and credibility of the whole anti-laundering dispositive have also been raised by civil society.

33. In fact, lack of transparency on accountability procedures undertaken against the banks may lead to the conclusion that they are still accepting "dirty money" "below the radar" and that such activities continue to go unnoticed by the general public.[52] This situation may demonstrate that the financial sector has gained such great power and lobbying capacity as to allow it to avoid taking seriously its obligations to undertake preventive measures and cooperate with public authorities in this field.

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[44] O. Longchamp and M. Herkenrath, "Money-laundering, liability and sanctions for financial intermediaries — the issue of having the assets of politically exposed persons in Switzerland", in Fenner Zinkernagel, *Emerging Trends in Asset Recovery*, p. 128; "Banks scrutinize regimes' assets", *Wall Street Journal*, 23 February 2011.

[45] In 2015, the Swiss Financial Market Supervisory Authority, FINMA, approved the Swiss banks' code of conduct with regard to the exercise of due diligence, drafted by the Swiss Association of Bankers.

[46] The current FINMA Director, Mark Branson, is a former Director of UBS and was previously in charge of UBS Japan, involved in the scandal of the manipulation of the Libor rate.

[47] The Authority's costs are borne by the supervisory fees and levies paid by those institutions.

[48] See article 40 of the *Loi sur l'Autorité fédérale de surveillance des marchés financiers* (*Loi sur la surveillance des marchés financiers*).

[49] Longchamp and Herkenrath, "Money-laundering", p. 133.

[50] *Anti-Money-laundering and Counter-Terrorist Financing Measures: Switzerland: Mutual Evaluation Report*, December 2016, pp. 91 and 105.

[51] FINMA sanctions are particularly painless for banks; see "Trois banques épinglées pour leur gestion de fonds", *24 Heures*, 21 October 2013.

[52] O. Longchamp, report on Switzerland's experience of assets recovery, working document, Public Eye (forthcoming).

B. Return of stolen assets

34. The situation is absolutely striking in relation to the return of stolen assets. Hundreds of millions of dollars of illicit provenance remain frozen in Switzerland.[53] The Government claims that it is seeking — honestly and vigorously — to return these funds to the countries of origin.[54] It also claims that the lack of restitution is eroding the good reputation and integrity of the Swiss financial centre. There is a similar willingness at the cantonal level. In Geneva, for example, the millions of dollars in illicit financial flows laundered through the housing market have led to a housing crisis that disproportionally affects the working class and the poorest sectors of the society.

35. A number of legal matters relating to the return of stolen assets are currently pending before the Swiss courts. National legislation provides means to appeal at all stages of the proceedings. Procedures are protracted and lawyers are making huge profits from assisting criminals to hide and benefit from illicit financial flows. In the case of the former dictator of Nigeria, for example, those assisting Sani Abacha in avoiding the restitution of the stolen assets took a total of $17 million.[55] They are competent and efficient in delaying tactics, which partially explains why the assets stolen by the Ben Ali-Trabelsi and Mubarak clans in 2011 have not yet been returned to the countries of origin.

36. The Foreign Illicit Assets Act 2015 was passed to facilitate the restitution of illicit assets also in cases where mutual legal assistance is not feasible or fails. However, the impact of this specific regulation remains to be seen in practice. The law may facilitate the release of illicit assets frozen when a solution of compromise is reached between the affected State and the person suspected of misappropriation. Such arrangements are controversial, since they also preclude any legal proceedings initiated in the country of origin as well as anti-money-laundering investigations taking place in Switzerland.[56]

VI. Case studies on the repatriation of illicit financial flows

37. The following examples show the role financial institutions play by blatantly accepting suspicious funds. Banks and law professionals profit from these protracted and complex processes to make huge profits at the expense of the affected countries, which need the money for development and the enjoyment of all human rights.

A. Nigeria

38. This is one of the exceptional cases in which a looted State managed within a reasonable period of time to successfully repatriate much of the illicit financial flows transferred outside its shores. As is well known, the former dictator, Sani Abacha, and his entourage managed to misappropriate over $2 billion of State funds.[57] Money was systematically diverted from the Central Bank to banks in Austria, Liechtenstein, Luxembourg, Switzerland, the United Kingdom of Great Britain and Northern Ireland and Jersey, and the United States. In Switzerland alone, the Abacha clan had a total of 130 bank accounts.

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[53] The country has returned $2 billion in the past 30 years. However, hundreds of millions of dollars are still frozen.

[54] Switzerland has recently published the booklet *No Dirty Money: The Swiss Experience in Returning Illicit Assets*, December 2016.

[55] S. Besson, "La fin de l'affaire Abacha enrichit deux etudes d'avocats genevois", *Le Temps*, 17 March 2015.

[56] O. Longchamp and Herkenrath, "Money-laundering", p. 136.

[57] The looted funds were transferred directly to bank accounts abroad held by offshore companies belonging to members of the Abacha clan or foreign businessmen, who then remitted the same sums to members of what were characterized as "a criminal organization". See E. Monfrini and Y. Klein, "The Abacha case", in M. Pieth, ed., *Recovering Stolen Assets* (2008), pp. 10-11.

39. In 2000, investigations opened by the Swiss authorities resulted in a report incriminating 14 banks for lack of compliance with their due diligence duties under anti-money- laundering legislation. The authorities, however strikingly concluded that the existing regulatory framework was in principle sufficient and even extensive if compared internationally and that the Swiss financial centre had appropriate rules designed to avoid undesirable funds.[50]

40. In 2004, thanks to the action of the Geneva Public Prosecutor, Bernard Bertossa, the greater part of the frozen assets were repatriated to Nigeria. Switzerland responded favourably to Nigeria's request for mutual legal cooperation. In addition, criminal investigations into money-laundering were opened pursuant to articles 305 ff of the Swiss Criminal Code. By considering that the structure set up by Abacha and his accomplices constituted a "criminal organization", the Swiss courts confirmed that the illicit origin of the assets may be presumed under certain circumstances.[51]

41. In 2016, Nigeria tried to recover another $321 million that had been confiscated in Switzerland. However, after an extrajudicial agreement reached between the Government of Nigeria and the family of the former dictator, Switzerland agreed to return part of the funds to the Government while simultaneously dropping criminal proceedings against Abba Abacha, the son of the deceased dictator, who waived all further claims to the assets.[52]

B. Tunisia

42. For more than 20 years, the former dictator of Tunisia diverted public funds and public properties for his own benefit. According the World Bank, more than 21 per cent of the profits generated by the Tunisian private sector were controlled by the dictator's clan.[53] Zine El Abidine Ben Ali and his accomplices used public institutions as tools to favour their private businesses and manipulated the law to serve their personal interests and punish those who opposed them.

43. In 2011, mutual legal assistance proceedings to clarify the origin of the $61,750,000 blocked in Switzerland were immediately undertaken. FINMA also announced sanctions and stated that the identity of the banks involved in the looted Tunisian public treasure would be made public. The list was never released, nor was information on any eventual sanction imposed on any of the banks suspected of accepting and hiding the money of the Ben Ali and Mubarak clans. In 2013, FINMA concluded that only in 4 of the 22 cases examined was it necessary to initiate a binding "administrative" procedure to secure information on the role played by the banks in "grave wrongdoings".[54]

44. In March 2015, Tunisia filed a civil action against HSBC claiming SwF 114 million plus interest for having accepted the fortune of Ben Ali's brother-in-law. The funds of illicit origin would have transited through HSBC accounts in the period when corruption was particularly notorious in Tunisia. Reportedly, the bank's own compliance body had pointed out this fact to the managers.[55]

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[50] Commission fédérale des banques, "Fonds Abacha auprès des banques suisses", 30 August 2000, p. 18.

[51] Swiss Federal Office of Justice, "Abacha funds to be handed over to Nigeria: majority of assets obviously of criminal origin", 18 August 2004.

[52] "Nigéria : Genève clôt en catimini le dossier du dictateur Abacha", *Le Monde*, 17 March 2015.

[53] B. Rijkers, C. Freund and A. Nucifora, *All in the Family: State Capture in Tunisia*, World Bank, Policy Research Paper No. 6810 (2014).

[54] FINMA, *Obligations de diligence des banques suisses en relation avec les valeurs patrimoniales de «personnes politiquement exposées»*, 10 Novembre 2011, pp. 7-10 (subsequently updated).

[55] The bank charged management commissions of 2 per cent, amounting to a total of SwF 8.3 million. "La Tunisie réclame 114 millions de francs à HSBC pour avoir accueilli l'argent du clan Ben Ali", *Le Temps*, 19 March 2015.

45. After six years of proceedings, only a quite paltry sum ($250,000) has been repatriated.[64] An early order to return to Tunisia $40 million whose criminal origin had been sufficiently established was, however, overturned on appeal by a court which found a violation of the accused's right to be heard.

46. The repatriation of the funds will be possible once final and enforceable judgments confirming the illicit origin of the frozen assets have been issued or concluded in Tunisia. The Tunisian Government has to prove the acts of embezzlement and corruption committed by Ben Ali and his accomplices. But freezing orders have a limited duration, legal procedures are too slow and the crimes that are at the origin of the requests for repatriation are subject to statutes of limitation.

C. Malaysia

47. The case involving Malaysia refers to the alleged misappropriation of $4 billion from a State-owned investment fund set up in 2009 to promote economic and social development projects. Dozens of interconnected people, companies and Governments have been identified as having a connection with the fund, which operates mainly from the Cayman Islands. Malaysia has rejected the Swiss offer of legal assistance, claiming that criminal investigations are being conducted by its own authorities.[65]

48. In Switzerland, criminal investigations into bribery and money-laundering revealed that about $800 million were illicitly deviated through three Swiss banks (reportedly, BSI SA, Coutts & Co. Bank and Falcon Private Bank).[66] FINMA has withdrawn the banking licences of all of them for flagrant violations of anti-money-laundering obligations and has confiscated the illicitly gained profits from Falcon (SwF 2.5 million) and Coutts & Co. (SwF 6.5 million). Only in the case of Coutts were criminal proceedings also opened for suspected deficiencies in the bank's internal organization and FINMA is reportedly considering opening enforcement proceedings against the responsible employees.[67]

VII. Negative impact of the non-repatriation of illicit financial flows on the enjoyment of human rights

49. The non-repatriation of illicit financial flows not only contributes to increasing the gap between developed and developing countries; it also hinders the socioeconomic development of the developing countries in particular, as well as their capacity to deliver basic social services to their citizens. As a consequence, citizens' confidence in the Government and the rule of law is eroded, and corruption and poverty perpetuated.

Non-return jeopardizes the enjoyment of economic, social and cultural rights

50. Illicit financial flows reduce the resources to be committed to social and economic investment and infrastructure, jeopardizing the State's ability to fulfil economic, social and cultural rights to the maximum of its available resources. Diversion of funds through corruption particularly impacts on the socioeconomic rights of the population of the poorest States, which may encounter difficulties in fulfilling their minimum core obligations with respect to the most basic rights: the right to food, the right to an adequate standard of living, and the rights to health and education.[68]

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[64] "Switzerland to return over USD 250,000 of Ben Ali's money to Tunisia", *Africanews*, 1 June 2015. In addition, Tunisia managed to recover $28.8 million held by Ben Ali's wife in a Lebanese bank.

[65] See www.admin.ch/gov/en/start/documentation/media-releases.msg-id-60510.html.

[66] Ibid.

[67] FINMA, "FINMA sanctions Coutts for 1MDB breaches", 2 February 2017; "Falcon sanctionné pour ses manquements en lien avec 1MDB", 11 October 2016.

[68] See, for example, African Commission on Human and Peoples' Rights, communications Nos. 25/89, 47/90, 56/91 and 100/93, *Free Legal Assistance Group and others v. Zaire*.

51. The negative consequences for the affected population derived from the non-repatriation of illicit financial flows are evident. When the population is deprived of the minimum quality standards indispensable for survival, not only the civil and political but also the economic, social and cultural rights of the population are violated. Such violations undoubtedly have a direct impact on the dignity of the citizens, whose most fundamental rights are deliberately curtailed.

52. In Tunisia, the return of the assets frozen in several countries would contribute to alleviating the effects on the population of the increasing fiscal pressure caused by the country's deteriorating economic situation. The repatriation of the looted money to Yemen would certainly contribute to ameliorating the extreme living conditions of the population in a country with one of the lowest rates of human development.[69]

Non-return hinders the realization of the right to development

53. The non-repatriation of illicit financial flows deprives countries of origin of the much-needed additional resources for public investment, jeopardizing its development prospects. Developing countries lose billions of dollars every year through illicit financial flows. In Africa, it is estimated that over the past 50 years, the continent has lost $1 trillion in illicit financial flows. This amount is equivalent to all the official development assistance received in the same time frame.[70]

54. Furthermore, non-repatriation of illicit financial flows creates immense human suffering and clearly undermines development. Countries lose capital for investment and revenue that could have been used to finance development programmes. These outflows pose a particularly serious concern to countries with high levels of poverty and increasing resource needs due to population growth. Reduction of official development assistance due to the global economic and financial crisis is compelling even more developing countries to look to their own resources to fund their development agendas.[71]

55. Deprived of important monetary assets and of the revenues of their natural resources, developing countries are forced to reduce investment in key development sectors or to increase their debt burden in order to introduce the necessary policies at the domestic level. Lack of public policies and investment in social and economic programmes disproportionately affects the weakest sectors of the population.

56. Illicit financial flows also undermine State capacity and governance. The people and corporations behind illicit financial flows usually become involved in acts of corruption in order to transfer the proceeds of bribery and abuse of power. By preventing the proper functioning of regulatory institutions, they compromise State officials and institutions. This situation may reverse all efforts to reinforce State structures and to consolidate the rule of law.

57. Countries which are rich in natural resources and countries with inadequate or non-existent institutional architectures particularly attract illicit financial flows. In a memorandum of understanding on the modalities for the return to Nigeria of stolen assets confiscated by the United Kingdom of Great Britain and Northern Ireland, it was acknowledged that the embezzlement of large amounts of State funds considerably reduced the resources available to the Government of Nigeria to provide social services or invest in infrastructure and economic development in order to move the country to greater

[69] Yemen ranks 168 out of 188 countries on the Human Development Index. In 2013, 4 per cent of the population was considered by the United Nations Development Programme as suffering from multidimensional poverty. Today, food insecurity affects 70 per cent of the population as a result of the armed conflict. See H. Kodmani, "Guerre oubliée au Yémen : la famine menace", *Libération*, 23 March 2017.

[70] ECA, *Illicit Financial Flows: Report of the High Level Panel*, p. 14.

[71] Ibid., p. 53.

prosperity. The plundering of national revenues may thus ultimately lead to a violation of the right of the people to freely dispose of their natural wealth and resources.[72]

Non-return reinforces impunity and perpetuates corruption

58. The non-repatriation of stolen assets sends the wrong message: that cases of grand corruption will remain unpunished. Impunity must be avoided, particularly where national resources and public funds have been systematically plundered, or such actions have been tolerated, by those in the Government or in powerful positions.[73]

59. Although the concept of crimes against humanity has traditionally been linked to grave or systematic violations of civil and political rights, there is no doubt that the international community also has a great interest in putting an end to impunity for economic and financial crimes, particularly those that can be qualified as grand corruption. There is no doubt that criminal organizations emerging from kleptocratic regimes, i.e. those whose only objective is the pillage of the State's resources, cause direct damage to the State and affect the fundamental rights and freedoms of the population.[74]

60. It is therefore not audacious to affirm that there is a connection between crimes against humanity and the systematic pillage of the public resources of a country. Corruption and abuse of power, when systematically orchestrated from the Government, lead to an unjustified increase of the debt burden and curtail the socioeconomic progress and sustainable development of the country.

61. Economic crimes must be an integral part of transitional justice frameworks. Amnesties, immunities or statutes of limitation should not serve to guarantee impunity to those responsible for violations of economic, social and cultural rights which may amount to crimes against humanity. Accountability for serious human rights violations and economic crimes committed under past regimes must be prosecuted, as amnesty in cases of grand corruption contributes to the weakening of processes of transition to democracy.

VIII. Main challenges inhibiting the return of illicit funds

62. As noted earlier, attempts to return illicit funds expatriated mostly from developing countries have too often been difficult or ineffective. The main challenges that inhibit the return of these funds are described in the following paragraphs.

Lack of political will

63. Repatriation involves the return of funds that have, over time, become imbricated in the economies of the countries to which they have been transferred. Some of these destination countries have adopted lax financial regulation in a deliberate attempt to compete with offshore financial centres for illicit funds, and the negative discourse surrounding such centres is intended to skew competition.[75] The withdrawal of these funds thus would require the destination countries to take action against powerful domestic

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[72] In a complaint filed with the African Commission on Human and Peoples' Rights by the Asociación Pro Derechos Humanos de España against Equatorial Guinea, the organization considered that the Government's plundering of national oil revenues violated the right of the people of Equatorial Guinea to freely dispose of their natural wealth protected by the African Charter on Human and Peoples' Rights. See www.opensocietyfoundations.org/sites/default/files/a_communication_20071012.pdf.

[73] For a definition of grand corruption, see E. Hava, "Strategies for preventing international impunity", *Indonesian Journal of International and Comparative Law*, vol. II, No. 3 (July 2015), p. 520.

[74] See E. Monfrini and Y. Klein, "L'Etat requérant lésé par l'organisation criminalle: l'exemple des cas Abacha et Duvalier", in *Etat de droit et confiscation international*, Sandrine Giroud and Alvaro Borghi, eds. (Edis, 2010), p. 135.

[75] See, generally, Donato Masciandaro, ed., *Global Financial Crime: Terrorism, Money-laundering and Offshore Centres* (London, Ashgate, 2004) and J.C. Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Ithaca, Cornell University Press, 2011).

interest groups such as financial institutions[76] and real estate developers; this is far harder than blaming island nations far away for their lax financial practices.

64. *Benefits of illicit financial flows to local property markets*. Illicit funds are now key to shoring up real estate markets in many places, including London, New York and Vancouver, Canada. The impact of their repatriation would not be limited to construction- and property finance-related industries, but would also be manifest in decreased spending power available to most consumers in economies of these destination countries.

65. *Benefits of illicit financial flows to local financial markets*. In 2009, the Executive Director of the United Nations Office on Drugs and Crime revealed that at the height of the 2008 financial crash, drug money was pumped into the global financial system to keep it afloat.[77] Foreign funds, including illicit financial flows, have also been key to shoring up all too many credit-driven, developed economies due to their lack of domestic savings that would finance their economic growth.[78] Thus, the hasty withdrawal of any funds, licit or illicit, due to the need to repatriate them to their countries of origin would severely affect the economies of many developed countries.

66. *Benefits of illicit financial flows to local professional service providers*. Many jurisdictions have specialized in the provision of financial and legal services to those who are involved in the generation and facilitation of illicit financial flows.[79] However, the list of illicit financial flows-friendly countries/jurisdictions includes Switzerland, Hong Kong and Singapore, as well as Delaware, Nevada and Wyoming in the United States.[80] Thus, the hasty repatriation of the illicit funds which are "banked" in these jurisdictions would threaten the stability and prosperity of the economies of these jurisdictions.

Difficulty of establishing a nexus between illicit financial flows and crime and/or civil wrongdoing

67. In the case of illicit flows resulting from criminal conduct, establishing a clear link between crime committed in the country of origin and the proceeds of crime in the destination jurisdiction is inordinately difficult.[81] This difficulty is compounded by the fact that the link — the proof — needs to be incontrovertible if repatriation is to be ordered. Where the illicit financial flows stem from activities which qualify as civil wrongdoings, repatriation is all the more difficult since there is no clearly established international convention for doing so. As noted in section V, while instruments such as the United Nations Convention against Corruption urge States to "consider" cooperating in such cases, this provision remains of advisory — and thus limited — utility.

Difficulty of establishing beneficial ownership and/or piercing the corporate veil

68. Whether illicit financial flows stem from crime, corruption or tax abuse, many — if not most — transactions are conducted behind several corporate veils and routed through

[76] Jack Smith, Mark Pieth and Guillermo Jorge, "The recovery of stolen asses: a fundamental principle of the UN Convention against Corruption", U4 Brief No. 2, Chr. Michelsen Institute, February 2007. Available at www.u4.no/publications/the-recovery-of-stolen-assets-a-fundamental-principle-of-the-un-convention-against-corruption/. Malaysia picks up this point in its general observations in response to the questionnaire.

[77] Rajeev Syal, "Drug money saved banks in global crisis, claims UN advisor", *Observer*, 13 December 2009, available at www.theguardian.com/global/2009/dec/13/drug-money-banks-saved-un-chief-claims.

[78] See www.forbes.com/sites/mikepatton/2014/10/28/who-owns-the-most-u-s-debt/#20e0d1141907.

[79] See Shaxson and Christensen, "Tax competitiveness".

[80] Jana Kasperkevic, "Forget Panama: it's easier to hide your money in the US than almost anywhere", *Guardian*, 6 April 2016. Available at www.theguardian.com/us-news/2016/apr/06/panama-papers-us-tax-havens-delawarewww.theguardian.com/us-news/2016/apr/06/panama-papers-us-tax-havens-delaware.

[81] Cynthia O' Murchu, "Follow the money", *Financial Times*, 14 August 2011.

multiple jurisdictions to extinguish traces of ownership.[82] As such, it is too often very hard to conclusively identify the beneficial owner of a company.

Debates over conditionality or the human rights-based approach

69. This is rapidly shaping into one of the most divisive issues in the repatriation of illicit funds. Advocates of conditionality — particularly in the destination countries in the global North — insist that the return of funds be conditioned on promises that the country of origin will use them to satisfy human rights obligations.[83] Predictably, countries of origin in the global South are vehemently opposed to the idea of conditionality being attached to the use of their own funds.[84] Further, they contend that they should be able to design and fund development projects based on their national priorities, not on Western notions of "appropriate" human rights projects. The notion is thus highly problematic.

IX. Importance of international cooperation in the return of funds of illicit origin

70. Illicit financial flows carry serious economic and human rights consequences that cannot be redressed without concerted international cooperation, and even solidarity. For example, the African Commission on Human and Peoples' Rights notes that both multinational corporations and individuals from Africa drain billions of dollars every year from the continent.[85] Unless all countries commit to significantly more coordinated global action to address loopholes, weak laws and monitoring across jurisdictions, many such countries will continue to be drained of their revenue potential.

71. The return of illicit financial flows derived from tax abuse, criminal activity and/or corruption depends in part on the forensic audit skills and strong State prosecution services that some countries of origin, particularly developing countries, lack. This need is exacerbated where law enforcement authorities lack the ability to prosecute transnational crime[86] and where criminal syndicates and politicians control or have significant influence over the legal and State authorities in the source countries. Finally, repatriation is also exceedingly difficult where the underlying wrongful act is civil in nature rather than criminal.

72. In many cases where illicit financial flows are routed via multiple jurisdictions to their eventual destination, repatriation also requires engagement with multiple legal regimes. Without greater international cooperation, it will be even more difficult for many countries of origin to trace illicit financial flows and meet the standards of proof required to effect repatriation. There will also be a host of procedural issues. In Jamaica, for example, domestic courts necessarily address the issue of restitution under local statutes. However, the procedural law does not differentiate between residents and non-residents when it comes to victims and third-party claimants, thus creating problems regarding witness attendance and the taking of admissible evidence.[87] Further, the criminal networks and politicians who control State and legal authorities in some of the countries of origin will continue to facilitate illicit financial flows unless destination countries recognize their

[82] Emile van der Does de Willebois and others, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What To Do About It*, Stolen Asset Recovery Initiative (Washington, D.C., World Bank, 2011) available at http://documents.worldbank.org/curated/en/784961468152973030/The-puppet-masters-how-the-corrupt-use-legal-structures-to-hide-stolen-assets-and-what-to-do-about-it; and OECD, *Better Policies for Development 2014*, p. 27.

[83] See the response of the European Union to the questionnaire.

[84] See, for example, the response of Juan Pablo Bohoslavsky to the questionnaire and Human Rights Council resolution 31/22.

[85] Resolution 236 adopted by the African Commission on Human and Peoples' Rights on 23 April 2013, available at www.achpr.org/sessions/53rd/resolutions/236/.

[86] Response of Jamaica to the questionnaire.

[87] Response of Jamaica to the questionnaire.

primary responsibility in preventing such crimes against humanity and divert illicit financial flows from their countries.

73. In their ostensible competition for foreign investment, speculative financial flows and/or individual wealth, poor countries are increasingly pitted against each other in needless "tax wars" that do little more than eventually shrink almost all of their tax bases, distort markets and lead to a regulatory race to the bottom.[88] Greater international cooperation can allow poor countries to resist the temptation to institute such "beggar-thy-neighbour" policies and maintain a common minimum standard to protect all of their respective markets and tax bases.

74. In order to prevent illicit financial flows, all stakeholders need to be equally committed to both South-South and North-South cooperation. The necessity of North-South cooperation stems from the fact that the final destinations of almost all illicit financial flows are either rich Western countries or their satellites.[89] This point is picked up by the Independent Expert in his final study, in which he noted that "many of the world's most important secrecy jurisdictions are developed countries, which have historically been overlooked in their role in facilitating tax evasion" and illicit financial flows (see A/HRC/31/61, para. 9). Further, in a 2014 report, OECD noted that "without action, OECD countries are at risk of becoming safe havens for illicit assets from developing countries".[90] Unless secrecy jurisdictions and destination countries commit to doing all that they can to prevent illicit financial flows landing on their shores, the "safe haven" charge is likely to stick.

75. South-South cooperation is also critical as it will, first, arrest regional beggar-thy-neighbour taxation and anti-corruption policies by enhancing cooperation, presenting a common front and reducing harmful competition. Second, this kind of cooperation could conceivably lead to the formation of regional economic blocs focused on this issue that would tend to strengthen the negotiating positions of the poorer countries vis-à-vis the relevant multinational corporations and their countries of origin.[91] This will address the fundamental imbalance of wealth and power between these actors.

X. Conclusions and recommendations

76. **Without effective repatriation of the stolen assets, developing countries and countries in transition to democracy are deprived of very much needed resources, and the opportunity to take advantage of the momentum for undertaking the economic and social reforms necessary for bolstering development, is being missed. The delaying tactics of Governments and banks as well as attempts to justify hindrances to the effective return of illicit financial flows are not only reproachable from a moral point of view but also politically and economically unacceptable.**

77. **The fact that the countries that struggled for democracy during the Arab Spring had not been able to recover the money looted by their former dictators is scandalous. Stolen assets must be effectively returned not only because those resources are urgently needed, but also because of their highly symbolic value. The international community must urgently send a strong message: corruption promoted by the highest levels of the State cannot be tolerated and will not go unpunished.**

78. **States must cooperate in good faith to facilitate the repatriation of illicit financial flows. They must enact proactive legislation and promote policies and practices aimed at facilitating the smooth and prompt return of the assets to the**

[88] Shaxson and Christensen, "Tax competitiveness".

[89] OECD reports on illicit financial flows; J. Henry, "How to respond to the Panama Papers", *Foreign Affairs* (April 2016), available at www.foreignaffairs.com/articles/panama/2016-04-12/taxing-tax-havens; and Shaxson and Christensen, "Tax competitiveness".

[90] OECD, *Illicit Financial Flows from Developing Countries*, p. 3

[91] Krishen Mehta and Erika Dayle Sui, "Ten ways developing countries can take control of their own tax destinies", in Pogge and Mehta, *Global Tax Fairness*, p. 353.

countries of origin. The international community must struggle to curb predatory financial practices which lead to human rights violations and contribute to erosion of the rule of law.

79. The Advisory Committee of the Human Rights Council recommends that Member States:

(a) Ensure the prompt and unconditional repatriation of funds of illicit origin to the countries of origin. A renewed, decisive and pro-active global commitment is needed to tackle the phenomenon of illicit financial flows and their ensuing negative impact on human rights and the right to development. States must take urgent action to push forward the procedures aimed at the recovery of stolen assets. They must adopt all measures needed to prevent the plundering of public assets to the benefit of private individuals or entities. Corruption and other practices that tend to maximize profits by circumventing the spirit of the law must be curtailed. Policies to end corruption and money-laundering must be decisive, and preventive measures must be effective and implemented in practice;

(b) Ensure that the crimes that are at the origin of illicit financial flows and grand corruption are adequately sanctioned and do not remain unpunished or subject to statutes of limitation. Impunity for those who systematically and massively plunder public resources is unacceptable. Those responsible for grand corruption must be held accountable and amnesty laws should not be misused to avoid justice. Under certain circumstances, financial crimes with transnational implications should be prosecuted at the international level and not be subject to statutes of limitation. States should consider ways to characterize as punishable international crimes, i.e., as crimes against humanity, acts of corruption that are carried out systematically and have a genuine impact on the social and economic well-being of the population, i.e., acts that lead to the dismantling of social services, thereby hindering economic and social progress;

(c) Ensure that the banks and financial intermediaries involved, notably those specialized in asset management, are held accountable for their involvement in illicit financial flows. States must urgently ensure that banks and other financial intermediaries operating in their jurisdiction conduct their business with due diligence. States should monitor their compliance with all preventive measures envisaged at the national level effectively and hold banks and banks managers accountable in cases of violation. Criminal sanctions must be envisaged and they must be proportional to the gravity of the case. States must ensure that financial intermediaries proactively take actions to fight corruption and money-laundering. Banks must provide proof of the actions that are being taken to avoid "dirty money". States must ensure that regulatory authorities undertake all necessary measures to guarantee banks' due diligence and accountability and that those measures are implemented in practice; the authorities must also effectively demonstrate impartiality and independence in their functioning;

(d) Support the suppression of tax havens and the regulation of offshore companies. The problematic surrounding asset recovery processes should be addressed as part of a broader international dialogue on the reform of the international financial system. States should actively support global initiatives aimed at curtailing those practices in the financial sector that favour illicit financial flows. More specifically, they must join the struggle undertaken by OECD against tax havens and offshore companies by supporting the setting up of a publicly available international register of offshore companies; prohibiting anonymous shares in limited liability companies; and making the ultimate beneficiary nominee of shares publicly known;

(e) Support action by the Security Council on the freezing of illicit financial flows and encourage the extension of similar measures to other cases. Council resolutions 2140 (2014) and 2216 (2015) on the situation in Yemen, by means of which individuals or entities designated by the 2140 Sanctions Committee are listed and sanctioned, are particularly welcome. Analogous measures should be considered in

other similarly blatant cases, notably to support judicial cases dealing with the non-repatriation of public money stolen by means of grand corruption.